DOCUMENT RESUME

ED 339 291 HE 025 076

AUTHOR Karr, Mary Beth
TITLE Financial Exigency as Just Cause for Dismissal of Tenured Faculty in Higher Education: What Are the Legal Issues?
PUB DATE Oct 91
NOTE 25p.; Paper presented at the Annual Meeting of the Midwestern Educational Research Association (Chicago, IL, October 7, 1991).
PUB TYPE Speeches/Conference Papers (150) -- Information Analyses (070)

EDRS PRICE MF01/PC01 Plus Postage.
DESCRIPTORS Case Studies; Court Litigation; *Dismissal (Personnel); Faculty College Relationship; *Financial Exigency; Higher Education; Legal Problems; Personnel Policy; *Reduction in Force; *Teacher Dismissal; *Teacher Rights; *Tenured Faculty

ABSTRACT

This paper addresses the legal issues surrounding a university or college's action of dismissing tenured faculty members because of the school's troubled financial condition or program discontinuance. It explores various legal principles through an examination of specific questions. These questions are: (1) How do the courts define financial exigency? (2) Does financial exigency pertain only to the institution as a whole? (3) On what grounds can tenured professors be dismissed due to elimination of a department or program? (4) What is the basis of the law regarding financial exigency and program discontinuance? (5) Is the institution required to offer alternate employment to the tenured professor dismissed due to financial exigency or program discontinuance? and (6) Can a nontenured faculty member be retained when a tenured professor is dismissed? Policy recommendations are offered to institutions that are considering a reduction in force that includes dismissal of tenured faculty. Recommendations include providing adequate due process to faculty members, avoiding consideration of any personal reasons for dismissal, following contractual obligations, having a long-range plan for regaining financial stability, and being prepared to prove bona fide financial exigency. Eleven court case summaries are provided. Contains 15 references. (GLR)

****
* Reproductions supplied by EDRS are the best that can be made *
* from the original document. *
****

ED339291

Financial Exigency As Just Cause for Dismissal of Tenured Faculty in Higher Education: What Are the Legal Issues?

Mary Beth Karr

Illinois State University

Presented at the Annual Meeting,
Midwestern Educational Research Association,
Chicago, Illinois, October 17, 1991

HE 025 076

"PERMISSION TO REPRODUCE THIS MATERIAL HAS BEEN GRANTED BY

Mary Beth Karr

TO THE EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)."

U.S. DEPARTMENT OF EDUCATION
Office of Educational Research and Improvement
EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)

X This document has been reproduced as received from the person or organization originating it.

☐ Minor changes have been made to improve reproduction quality.

• Points of view or opinions stated in this document do not necessarily represent official OERI position or policy.

BEST COPY AVAILABLE

TABLE OF CONTENTS

Introduction.....1

Legal Principles.....1-12

How do the courts define financial exigency?.....1

Does financial exigency pertain only to the institution as a whole?.....4

On what grounds can tenured professors be dismissed due to elimination of a department or program?.....5

What is the basis of the law regarding financial exigency and program discontinuance?.....6

Is the institution required to offer alternate employment to the tenured professor dismissed due to financial exigency or program discontinuance?...11

Can a nontenured faculty member be retained when a tenured professor is dismissed?.....12

Policy Recommendations.....13

References.....15

Case Summaries.....17

INTRODUCTION

Financial exigency in higher education became a legal issue during the 1970s and early 1980s, when higher education faced declining enrollments and turbulent economic conditions. Numerous court cases involving the dismissal of tenured faculty due to financial exigency and program discontinuance emerged during that time. The basis for exigency-related dismissals dated back to the American Association of University Professors *1940 Statement of Principles on Academic Freedom and Tenure*, which defined tenure and stated reasons for its termination:

> After the expiration of a probationary period, teachers or investigators should have permanent or continuous tenure and their service should be terminated only for adequate cause, except in the case of retirement for age, or **under extraordinary circumstances because of financial exigencies** [emphasis added]. ("Academic Freedom and Tenure," 1974, p. 270)

The *1940 Statement* remains widely accepted by higher education and the courts.

The number of legal cases regarding dismissal of tenured faculty due to financial exigency and program discontinuance diminished during the 1980s. However, the reduction of state and federal funding to higher education makes these pertinent topics for the 1990s.

LEGAL PRINCIPLES

How do the courts define financial exigency?

There is no single definition of financial exigency. In *AAUP v. Bloomfield College*, 346 A.2d 615 (N.J. Super. 1975), the

appeals court, disagreeing with the trial court which found no *bona fide* exigency, asserted that "state of urgency" best described the financial situation of the college (346 A.2d at 617). Following the Bloomfield case, the AAUP presented its definition of financial exigency in the *1976 Recommendations for Institutional Regulations on Academic Freedom and Tenure*:

> an imminent financial crisis which threatens the survival of the institution as a whole, and which cannot be alleviated by means less drastic [than the] termination of an appointment with continuous tenure, or of a probationary or special appointment before the end of the term. (Committee A, 1976, p. 186)

This definition has not been widely adopted by the courts, however (Gray, 1980; Johnson, 1981; Olswang, 1982).

Most importantly, the courts require that both the financial exigency and the faculty dismissal be "demonstrably *bona fide*" (346 A.2d at 616). This principle was established in *AAUP v. Bloomfield College*. The Bloomfield Faculty Handbook stated that *bona fide* financial exigency was grounds for termination of a tenured appointment. It also stated that a financial situation requiring drastic retrenchment precluded staff expansion except in extraordinary circumstances (346 A.2d at 616). Bloomfield College proved *bona fide* exigency at the time of its dismissal of the thirteen tenured faculty members; however, the College failed to prove that the dismissal had a *bona fide* link to its financial crisis. Instead, the court found that the College used financial exigency as a pretext for the dismissals of the tenured faculty in an attempt to eliminate the tenure system. The telling matter

regarding the dismissals was the hiring of twelve nontenured faculty members to replace the thirteen tenured professors.

Black (1968) defined *bona fide* as "in or with good faith; honestly, openly, and sincerely; without deceit or fraud" (p. 223). Good faith is defined as "honesty in intention, and freedom from knowledge of circumstances which ought to put the holder upon inquiry....An honest intention to abstain from taking any unconscientious advantage of another" (p. 822). These definitions parallel statements of the appeals court in *Krotkoff v. Goucher College*, 585 F.2d 675 (Fourth Cir. 1978):

> inherent in the concept of a "demonstrably *bona fide*" termination is the requirement that the college use fair and reasonable standards to determine which tenured faculty members will not be reappointed. The college's obligation to deal fairly with its faculty when selecting those whose appointments will be terminated is an attribute of tenure. Consequently, it is an implicit element of the contract of appointment. (585 F.2d at 682)

The *Bloomfield* court established that the burden of proving financial exigency is on the college or university (346 A.2d at 616). The courts have not provided specific instructions for proving financial exigency, however. While enrollment data may support financial exigency, financial information is of primary importance in establishing *bona fide* exigency.

The courts have stipulated that financial exigency must be determined on the grounds of operating funds and not on capital assets. In *Bloomfield*, the appellate court disagreed with the reasoning of the trial court that the College could have sold a specific property to improve its financial condition. The

appeals court stated that such a policy decision was within the authority of the governing board. Similarly, in the case of *Krotkoff v. Goucher College* the court concurred with *Bloomfield* and extended the principle to endowment funds. The *Krotkoff* court stated that "the existence of financial exigency should be determined by the adequacy of a college's operating funds rather than its capital assets" (585 F.2d at 675).

In summary, there are four important points pertaining to dismissal of tenured faculty due to financial exigency:

1) the exigency and the dismissal must be *bona fide*

2) the exigency is based on operating funds, not capital assets

3) the burden of proof is on the institution

4) the procedures for selecting faculty for dismissal must be reasonable and fair.

Does financial exigency pertain only to the institution as a whole?

The courts have established that financial exigency can exist in a department or college without extending to the entire institution. In *Scheuer v. Creighton University*, 260 N.W.2d 595 (S.C. Nebraska 1977), Creighton was considered fiscally healthy overall, but the Division of Health Sciences operated at a deficit, to which the School of Pharmacy contributed. The School of Pharmacy faced additional loss of federal funds due to declining enrollment. The State Supreme Court concurred with the lower courts that Scheuer could be dismissed because "'financial exigency' should be construed as requiring a determination within

a particular college, rather than requiring consideration of the financial condition of the University as a whole" (260 N.W.2d at 597).

On what grounds can tenured professors be dismissed due to elimination of a department or program?

Two circumstances justify program discontinuance: financial exigency and academic change. Either condition must be *bona fide*. In *Browzin v. Catholic University of America,* 527 F.2d 843 (D.C. Cir. 1975), the programs in Soil Mechanics and Hydrology, were eliminated in response to budget reductions. Browzin, a tenured engineering professor, was dismissed due to program discontinuance. The court upheld his dismissal, noting "that there was an abandonment of Browzin's program of instruction" due to "*bona fide* financial difficulties" faced by Catholic University (527 F.2nd at 848).

In *Jimenez v. Almodovar,* 650 F.2d 363 (First Cir. 1981), a pilot program in physical education at the University of Puerto Rico was discontinued due to low enrollment and program evaluations. As a result, Jimenez and another tenured professor hired to teach in this program were dismissed. In this case the institution did not claim financial exigency. Instead, there was a "*bona fide* change of [the] academic program" (550 F.2d at 364). Such a change implies a good faith decision on the part of the institution, including 1) a rational decision regarding the academic program and 2) no desire to eliminate the professor on any personal grounds.

What is the basis of the law regarding financial exigency and program discontinuance?

Contractual, constitutional, and statutory law provide the bases for issues of financial exigency and program discontinuance.

Contractual Law

Since we are concerned about the termination of tenured faculty contracts, contractual law is the basis of these issues. It applies to both public and private institutions in these cases. Applicable terms of contracts include express, referent, and implied. Express terms are those stated in the faculty contract. Referent terms usually include the faculty handbook, personnel policy or other documents referenced in the contract. Implied terms are certain matters of academic custom and usage which relate to the contract.

The decision in *AAUP v. Bloomfield College* was based on the express terms of the faculty contract, which stated that contracts could be terminated due to "extraordinary circumstances because of financial exigency of the institution" and that "termination of continuous appointment because of financial exigency must be demonstrably *bona fide*" (346 A.2d at 616). A more recent case, *Karr v. Board of Trustees of Michigan State University*, 325 N.W. 2d 605 (Mich. App. 1982), dealt with the express terms of contract, as well as the issue of the timing of faculty furlough. Karr, an assistant professor of criminal justice, claimed breach of contract due to lost pay resulting

from a 2.5 day layoff approved for all university employees by the Michigan State Board of Trustees. The Board action was in response to reduced state appropriations. According to Karr, his 1980-81 contract required the university to pay him the contracted amount of $17,839 (325 N.W. 2d at 606). The appeals court reversed the trial court opinion, ruling in favor of Karr. The court made this statement regarding contractual agreements:

> A contractual agreement which remains binding on the university during times of economic difficulty insures that the employee need not fear being put out of a job. The benefits inherent in such an agreement extend not only to the employee, but also to the university. It insures that the university will be able to obtain qualified instructors whose decision whether to accept employment with the university will not be adversely affected by concern that the agreement they enter into in good faith at the time that they accept employment will be subject to unilateral change any time thereafter that the Legislature decides to cut appropriations. (325 N.W. 2d at 608,609)

In *Scheuer v. Creighton University* the faculty contract, by reference to the Faculty Handbook, included financial exigency as grounds for dismissal of tenured faculty. The handbook stated that financial exigency included "*bona fide* discontinuance of a program or department of instruction or the reduction in size thereof" (260 N.W. 2d at 597). Similarly, in *Bellak v. Franconia College* 386 A.2d 1266 (S.C. N.Hampshire 1978), the college bylaws and faculty personnel policy were parts of the faculty contract. Specifically the college bylaws stated that professors, who received one-, two-, or three-year contracts rather than open-ended tenure contracts, could be dismissed by the Board "during term" for cause or under financial exigency (386 A.2d at

126). Bellak's two year contract was terminated after one year due to financial exigency. He claimed breach of contract but the court ruled in favor of the college, saying that it acted within its authority.

Implied terms of contract incorporate, through academic custom and usage, the common definition of tenure in cases where the express or referent terms of contract do not include financial exigency or program discontinuance as a reason for termination of tenured faculty contract. This was an issue in *Krotkoff* because neither the letter granting Krotkoff tenure nor the college bylaws cited financial exigency as a reason for contract termination (585 F.2d at 678). Based on testimony of an officer of the Office of Academic Affairs of the American Council on Education, the court stated that "a concept of tenure that permits dismissal based on financial exigency is consistent with the primary purpose of tenure" (585 F.2d at 679).

The doctrine of impossibility may also apply when the faculty contract does not reference financial exigency (Kaplin, 1989, p. 201). According to Black, impossibility as it applies to performance of a contract absolves the party from nonperformance, not only in strict terms but due to "impracticability because of extreme and unreasonable difficulty, expense, injury or loss involved" (Black, 1968, p. 888).

Constitutional Law

In addition to contractual law, constitutional law applies to public institutions, where due process rights under the

Fourteenth Amendment are of concern. In this analysis, there are four constitutional law cases: *Johnson v. Board of Regents of University of Wisconsin System*, 377 F. Supp. 227 (W.D. Wisconsin 1974); *Brenna v. Southern Colorado State College*, 589 F.2d 475 (Tenth Cir. 1978); *Levitt v. Board of Trustees of the Nebraska State Colleges*, 376 F. Supp. 945 (D. Nebraska 1974); and *Jimenez v. Almodovar*. In these cases, faculty members claimed that their due process rights were denied when their tenured contracts were terminated. In all cases, the courts found that due process was provided by the institution. In *Johnson* the court stated these minimal procedures should be provided a tenured faculty member dismissed due to financial exigency:

> 1) a "reasonably adequate" written statement of the basis for the decision
>
> 2) a "reasonably adequate" description of the manner in which the decision was made
>
> 3) "reasonably adequate" disclosure to the faculty member of the information and data used in the decision making
>
> 4) an opportunity for the faculty member to respond to the decision to dismiss (377 F. Supp. at 240).

As stated by the court in *Brenna*, the method for selecting faculty for dismissal can not be "arbitrary, capricious, or without a rational basis" (589 F.2d at 477). The plaintiffs in *Jimenez* and *Levitt* claimed that both their property and liberty interests had been denied. The courts disagreed. In *Jimenez* the court found that the administration had avoided personal grounds for dismissal, which had not left a "stigma or reflection on their reputation" (650 F.2d at 370). The *Levitt* court made similar statements.

Regarding due process rights, it is notable that, in cases of financial exigency and program discontinuance, the court may vary from the norm, placing the burden of proof on the college or university which has greater access to pertinent information than does the faculty member. This was the judgment of the appeals court in the *Browzin* case (527 F.2d at 849); however, it kept the burden of proof on Browzin because the trial court had originally assigned the burden to him.

Statutory Law

In addition to contractual and constitutional law, state statutes and administrative rules and regulations may define the legal responsibilities of public institutions in financial crisis. These include statutes and administrative regulations pertaining to collective bargaining. In *Washington Education Association v. State*, 652 P.2d 1347 (S.C. Wash. 1982), tenured faculty members at Skagit Valley College challenged the constitutionality of legislation enabling the State Board of Community College Education to declare financial exigency and reduce faculty positions. The Washington Supreme Court upheld the constitutionality of the statute.

In summary, the legal bases for cases of financial exigency and program discontinuance are 1) contractual law, 2) constitutional law (due process), and 3) statutory law.

Is the institution required to offer alternate employment to the tenured professor dismissed due to financial exigency or program discontinuance?

The answer is clearly "yes" in the case of program discontinuance. In *Browzin V. Catholic University* (program discontinuance due to financial exigency), the basis for Browzin's claim for other employment at the University was the *1968 Regulations* of the AAUP, which stated that the institution should "make every effort to place affected faculty members in other suitable positions" when abandoning a program or a department (527 F.2d at 846). This statement was intended to reduce dismissals of tenured faculty under the pretext of financial exigency. The court found that, while Catholic University was obligated to offer Browzin other employment, he failed to present a *prima facie* case that the University failed to do so. Therefore, the court ruled in favor of the University. It also affirmed that Browzin was not qualified for the positions that remained following the discontinuance of the programs in which he taught.

In *Krotkoff,* which involved both financial exigency and program discontinuance, the court stated that Goucher was contractually obligated to "take reasonable measures to provide her alternative employment" (585 F.2d at 682). Goucher provided Krotkoff a list of available positions at the College. Krotkoff requested a position in economics; however, her request was denied because the department chairman predicted that she would require two to four years of retraining for this position. The

court agreed that the College was not required to provide retraining for tenured faculty being dismissed. In the program discontinuance case of *Jimenez v. Almodovar*, the University of Puerto Rico offered Jimenez an alternative position in October following the July dismissal from the physical education department. Jimenez accepted that position.

It appears that when program discontinuance does not accompany financial exigency, the courts do not require institutions to offer alternative employment to the dismissed tenured professor. In *Levitt*, the court found that tenure failed to guarantee the faculty "continued rights to public employment" (326 F.Supp at 952). Justice Williams noted that the president of Peru State College, from which Levitt and his co-plaintiff, Wininger, were dismissed, had assisted Wininger to find alternative employment. Williams stated that the president had no obligation to do so.

Can a nontenured faculty member be retained when a tenured professor is dismissed?

If the financial exigency and dismissal are found to be *bona fide*, a nontenured faculty member can be retained when a tenured faculty member is dismissed. The *Brenna* court required that the selection process for dismissal not be arbitrary or capricious and noted that the Constitution does not require that tenured faculty members be retained over nontenured professors (589 F.2d at 477).

POLICY RECOMMENDATIONS

In light of the current economic conditions impacting higher education, colleges and universities should plan for financial exigency. As indicated by case law, institutions should be sensitive to matters of tenure. While financial exigency is a justifiable reason for dismissal of tenured professors, colleges and universities must carefully balance the financial viability of institutions with the benefits of the tenure system to protect academic freedom. Financial exigency cannot be used as a pretext for faculty dismissal or program discontinuance nor can the process for selecting faculty members to be dismissed be arbitrary or capricious. Recommendations for institutions considering reduction in force including dismissal of tenured faculty are these:

> 1) have sufficient data regarding finances, enrollment, accreditation, and program evaluations to prove *bona fide* financial exigency (Johnson, 1981, p. 278-9)
>
> 2) provide adequate due process to faculty members
>
> 3) avoid consideration of any personal reasons for dismissal
>
> 4) follow contractual obligations
>
> 5) have a long range plan for regaining financial stability (Johnson, 1981, p. 279).

A recent report of the Pew Higher Education Research Program recommends a proactive stance on financial exigency ("Cut Staffs," 1991). Specific recommendations to colleges considering cost cutting include 1) involving faculty members in analysis and planning, 2) involving lower level management in planning and implementation, and 3) considering consolidation of functions.

The Pew document also cautions that "last hired cannot be first fired....Cost containment cannot come at the expense of institutional diversity" (p. 34).

Colleges and universities should prepare for possible financial crisis by formulating a plan for budget reduction which involves faculty members. The plan should include procedures for selecting programs and personnel to be eliminated and should provide for due process. Also, faculty contracts should include express terms for termination in the case of financial exigency. Strategic alternatives to the dismissal of tenured faculty should be planned to precede termination of tenured positions.

REFERENCES

Academic freedom and tenure: 1940 statement of principles and interpretive comments. (1974) AAUP Bulletin, 60, 269-272. Contains widely cited definition of tenure and terms for its termination.

Benson, D. E. (1983). Tenure rights in higher education in the face of financial exigency: The impact of private agreement, collective bargaining, the AAUP and the courts. Detroit College of Law Review, 3, 679,707. Discusses *bona fide* financial exigency, issues of dismissing tenured and nontenured faculty to alleviate financial exigency, and substantive and procedural due process.

Black, H. C. (1968). Black's Law Dictionary. St. Paul, Minn.: West Publishing Co.

Bolger, T. M., & Wilmoth, D. D. (1982). Dismissal of tenured faculty members for reasons of financial exigency. Marquette Law Review, 65, 347-65. Discusses the authority of governing board to terminate tenured faculty due to financial exigency, the establishment of *bona fide* exigency, and the burden of proof and due process.

Committee A. (1976). Recommended institutional regulations on academic freedom and tenure. AAUP Bulletin, 62, 184-191. Includes definition of financial exigency and recommendations for related dismissal of faculty.

Cut staffs but not across the board, strapped colleges are advised. (1991, February 13). Chronicle of Higher Education, pp. 1, 34. Highlights policy recommendations of the Pew Higher Education Research Program report on retrenchment in higher education; also highlights steps taken by specific colleges in response to financial woes.

Financial emergency as a grounds for dismissal of tenured faculty in the Washington Community College System. (1983-84). Gonzaga Law Review, 19, 105-37. Provides a background of tenure and discusses *Washington Education Association v. State*.

"Financial emergency" and the faculty furlough: A breach of contract. (1983-84). Journal of College and University Law, 10(2), 225-42. Discusses the short term layoff due to financial exigency. Cites primarily public school cases; includes *Karr v. Board of Trustees (1982)*.

Financial stresses hit professors, but most colleges protect tenured ranks. (1991, February 27). Chronicle of Higher Education, pp. 1, 11-12. Discusses how institutions are cautiously proceeding regarding reduction of tenured ranks, in light of financial difficulties.

Gray, J. A. (1980). Higher education litigation: Financial exigency. University of San Francisco Law Review, 14, 375-402. Discusses *bona fide* financial exigency and the burden of proof in exigency cases *Bloomfield College, Browzin, Krotkoff.*

Johnson, A. B. (1981, July). The problems of contraction: Legal considerations in university retrenchment. Journal of Law and Education, 10, 269-324. Discusses the financial circumstances that justify retrenchment and recommends steps for institutions considering retrenchment. Discusses the implications of involving faculty, students, and alumni in retrenchment decisions and considers the impact such decisions have on various constituents.

Johnson, E. A., & Weeks, Kent M. (1985). To save a college: Independent college trustees and decisions on financial exigency, endowment use, and closure. Journal of College and University Law, 12, 429-37. Discusses the fiduciary role of the private college board of trustees as it relates to financial exigency. Includes case law pertaining to use of endowment and decision to close institution.

Kaplin, W. A. (1989). The Law of Higher Education. San Francisco: Jossey-Bass, Publishers.

Ludolph, R. C. (1986). Termination of faculty tenure rights due to financial exigency and program discontinuance. University of Detroit Law Review, 63(4), 609-55. Reviews the history of academic tenure rights; analyzes the constitutional and contractual bases for faculty terminations due to financial exigency and program discontinuance.

Olswang, S. G. (1982-83). Planning the unthinkable: Issues in institutional reorganization and faculty reductions. Journal of College and University Law, 9(4), 431-49. Discusses personnel issues related to program reduction and financial exigency includes questions for policy guidelines when removing tenured and nontenured faculty.

CASE SUMMARIES

AAUP v. Bloomfield College, 346 A.2d 615 (S.C. N.Jersey 1975)

The AAUP represented thirteen tenured faculty members whose contracts were terminated for reasons of financial exigency. Persons were hired for nontenured positions following the dismissal of the tenured faculty. The Faculty Handbook of this private college stated that financial exigency was a reason for termination, that the exigency must be *bona fide*, and that it precluded expansion of the faculty at that same time except in extraordinary circumstances (p. 616).

The court placed the burden of proof on the college administration. The appellate court found that a *bona fide* financial exigency existed, and stated that the existing condition was better labeled a "state of urgency" (p. 617). The appeals court disagreed with the trial court's reasoning that the college could have sold a specific property to improve its financial condition. Such a policy decision was within the authority of the board and the court should not interfere.

The court stated that, in addition to demonstrating that the financial emergency was *bona fide*, the contract required that the termination due to exigency was also *bona fide*. The court found that the college had not acted in good faith regarding the financial exigency. The administration used the financial condition as a pretext for the termination of the tenured faculty members in an attempt to eliminate the tenure system.

The appeals court affirmed the trial court remedy of reinstatement.

Bellak v. Franconia College, 386 A.2d 1266 (S.C. N.Hampshire 1978)

Richard Bellak, a faculty member on a two-year contract at Franconia College, was dismissed during the term of the contract. He sued for breach of contract, claiming that the Board of Trustees failed to follow procedures of the faculty personnel policy and college bylaws. Prior to the termination of Bellak's contract, the president had announced that the college would have a large deficit which would necessitate cutbacks throughout the operations of the institution. In response, the faculty voted to recommend to the Board that all of their contracts be terminated. The Board could then determine who among the faculty should be retained according to the impact on the institution. Accepting the faculty recommendation, the Board terminated all of the contracts, including Bellak's. His was not renewed.

The New Hampshire Supreme Court overturned the lower court, which ruled in favor of Bellak. The Supreme Court ruled that the Board had upheld the faculty contract, which specifically gave it

authority to release faculty "during term" (of contract) in cases of financial exigency (p. 1267).

Brenna v. Southern Colorado State College, 589 F.2d 475 (Tenth Cir. 1978)

Lyle Brenna, a tenured professor, was among 32 full time faculty members dismissed due to financial exigency. He was the only professor dismissed from his academic department. A nontenured professor was retained on grounds that the department had lost its accreditation and that the nontenured faculty member offered the department greater flexibility.

The plaintiff claimed denial of procedural due process under the Fourteenth Amendment. He had a property interest due to his tenure. Therefore, the method of selecting faculty for dismissal could not be "arbitrary, capricious, or without a rational basis" (p. 477). The Federal Appeals Court affirmed the lower court ruling that the college followed due process in selection of faculty contracts to be terminated. The court noted that the Constitution did not require that tenured faculty members be retained over nontenured faculty members.

Browzin v. Catholic University of America, 527 F.2d 843 (D.C. Cir. 1975)

Browzin, a tenured engineering professor, was terminated due to program discontinuance related to financial exigency. He sued for breach of contract. The major issue was the provision of suitable alternative employment in the case of program discontinuance. The basis for this was the 1968 Regulations of the AAUP which stated that "before terminating an appointment of a program or department of instruction, the institution will make every effort to place affected faculty members in other suitable positions" (p. 846). This clause attempted to prevent abuses of terminating faculty contracts under the pretext of financial exigency.

The district court ruled for the university because Browzin "failed to prove a prima facie case that the University failed to make every effort to place him in another suitable position, or that such a suitable position existed" (p. 849). The appellate court affirmed the district court ruling; however, it disagreed with the lower court's judgment that the burden of proof was on the plaintiff. The appeals court stated that the burden of proof should have been on the University, which had access to more pertinent information than did Browzin.

The appeals court also agreed with the district court's judgment that the University did not breach Browzin's contract by failing to offer him a new position, filled within a year and a half of his termination, for which he was partially qualified. The position was clearly a new position, and the new professor was not hired to fill Browzin's position.

Jimenez v. Almodovar, 650 F.2d 363 (First Cir. 1981)

Jimenez and another plaintiff were tenured faculty members teaching in a pilot program in physical education at a campus of the University of Puerto Rico. Their employment was terminated when the program was discontinued due to low enrollment and program evaluations. Jimenez claimed that he was denied his property and liberty rights without due process. The courts ruled that due process was not denied.

Johnson v. Board of Regents of the University of Wisconsin System, 377 F.Supp. 227 (W.D. Wisc. 1974)

Glen Johnson and other tenured faculty members in the University of Wisconsin System were laid off due to financial exigency. The faculty members charged that they had been denied procedural due process.

The University had experienced two consecutive years of budget cuts. Enrollment declines also resulted in reduced funding to the University System. The chancellors were assigned the task of determining the faculty members whose contracts would be terminated, and, in 1973, the faculty members were given a one-year notice of termination. The Regents then established procedures for reconsideration of the chancellors decisions. If requested by one of the faculty members, the chancellor was to see that the appropriate department chairperson or dean provided the faculty member a written statement of the reason for the lay off decision. The faculty member could then request reconsideration of the decision by a committee established by the chancellor. Questions to be answered by the committee were 1) whether or not there was sufficient evidence to support the decision, and 2) whether the chancellor or president had deviated from the established plan for determining the campus's fiscal and programmatic needs on which the lay off decisions were made.

The court ruled that the plaintiffs' Fourteenth Amendment rights had not been denied based on the following minimal procedures of due process in the case of termination of tenured faculty:

> furnishing each plaintiff with a reasonably adequate written statement of the basis for the initial decision to lay-off;
>
> furnishing each plaintiff with a reasonably adequate description of the manner in which the initial decision had arrived at;
>
> making a reasonably adequate disclosure to each plaintiff of the information and data upon which the decision-makers had relied; and
>
> providing each plaintiff the opportunity to respond. (p. 240)

Karr v. Board of Trustees of Michigan State University, 325 N.W.2d 605 (Mich. App. 1982)

Karr, an assistant professor of criminal justice, claimed breach of contract due to lost pay resulting from a 2.5 day furlough approved for all university employees by the Michigan State Board of Trustees. The layoff was in response to a $30 million reduction in state appropriations to the university. According to Karr, his 1980-81 contract in question required the university to pay him the contracted amount of $17,839. The appeals court ruled in favor of Karr, reversing the trial court decision. "Where an employee enters into a contract with an employer whereby the employer agrees to pay the employee a fixed amount for his services, the employer is required to pay such amount or he may be held liable in an action for breach of contract" (p. 607).

Krotkoff v. Goucher College, 585 F.2d 675 (Fourth Cir. 1978)

Hertha Krotkoff, a German professor at Goucher College, filed suit against the college after it terminated her contract due to financial exigency. The private liberal arts college for women had operated at a deficit from 1968-69 through 1973-74. Enrollment had declined during the same time, reducing income from tuition and fees. The endowment was depleted to half of the total deficit after its use to cover the deficit.

The board adopted numerous strategies to improve the financial situation: an aggressive investment policy, rental of the auditorium and excess dorm space, freezing salaries, deferred maintenance, and cutting administrative and staff positions. Eleven nontenured faculty and four tenured faculty, including Krotkoff, were dismissed also. The dismissals were based on enrollment projections and planned curricular changes.

A faculty committee reviewing curricular changes recommended eliminating the classics department and maintaining German classes to service other majors. Another tenured German professor who had not been teaching as long as Krotkoff was retained for the position in German because she taught the basic classes which students in other majors needed most.

Goucher attempted to provide Krotkoff with other employment at the College. She requested a position in economics; however, the request was denied because the department chairman predicted that two to four years of retraining would be necessary for Krotkoff. The court stated that, while the offer of alternative employment was required by contract, retraining was not required. While the contract and college by-laws did not state financial exigency as a reason for faculty dismissal, the court ruled that the common definition of tenure included "implicitly granting colleges the right to make *bona fide* dismissals for financial reasons" (p. 679). The court also stated that financial exigency was determined from operating funds and not from capital assets,

such as endowment. The dismissal and the financial exigency were *bona fide* in this case. Retraining of the faculty member was not a contractual requirement of the college nor is it an entitlement of tenure. The Federal Court of Appeals upheld the district court ruling in favor of Goucher College.

Levitt v. Board of Trustees of the Nebraska State Colleges, 376 F.Supp. 945 (D. Nebraska 1974)

The contracts of James Levitt and Darrell Wininger, another tenured professor, were terminated from employment at Peru State College. Their dismissals were recommended to the Board of Trustees in June 1973 following adoption of a state budget by the legislature in early 1973 that necessitated a reduction of faculty members at the college. The college administration adopted criteria to be used in the selection of the faculty members to be released. Levitt and Wininger were first informed that they were being considered for termination, then notified that their employment terminated at the end of the 1972-73 academic year. The plaintiffs were granted an injunction until proper hearing was held. The faculty grievance committee heard their complaints and concluded that the criteria used to select the faculty members for termination was unfair in some respects. Despite this assessment, the Board of Trustees affirmed their decisions for termination.

The court placed on the plaintiffs the burden of proving that the selection process was arbitrary or capricious. The plaintiffs failed to prove such in the eyes of the court, which found that neither their property nor liberty interests were denied. Since the college administration acted in good faith and with fairness and reason, the court chose not to interfere in the business of the college.

Scheuer v. Creighton University, 260 N.W.2d 595 (S.C. Nebraska 1977)

Plaintiff Edwin Scheuer, a tenured professor in the School of Pharmacy, was dismissed due to financial exigency. He requested reinstatement. Issues were whether the exigency should apply to the School of Pharmacy or to the University as a whole and whether financial exigency existed.

The State Supreme Court concurred with the trial court: that the contract included financial exigency in a department or college and that a financial exigency existed in the School of Pharmacy. The Faculty Handbook included procedures for termination of contract "based upon financial exigency, which may be considered to include *bona fide* discontinuance of a program or department of instruction or the reduction in size thereof" (p. 597). The School of Pharmacy contributed to the budget deficit of the Division of Health Sciences and faced additional loss of federal funds in 1976-77.

The classes in medicinal chemistry which Scheuer taught were reduced to one, to be taught by a senior tenured faculty member who could teach biochemistry as well as medicinal chemistry. Scheuer was qualified to teach only the class in medicinal chemistry. *The Court stated that the process used to select* Scheuer for dismissal was fair and reasonable (not arbitrary or capricious) and that financial exigency could apply to a department or college.

Washington Education Association v. State, 652 P.2d 1347 (S.C. Wash. 1982)

The State Board for Community College Education declared a state of financial emergency in the community college system in January 1981. Skagit Valley College discontinued its collective bargaining procedures on January 21, 1981, and then adopted procedures for reduction in force established by state statute. Tenured faculty members at Skagit were notified that their contracts would be terminated at the end of the 1981-82 academic year. Tenured faculty members claimed the state statute was unconstitutional. The Washington Supreme Court upheld the statute's constitutionality and stated that procedures for the reduction in force met required due process.